IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated.: 05.09.2007

CORAM:

THE HONOURABLE MR. JUSTICE K.MOHAN RAM

Second Appeal No.828 of 2007
and M.P.No.1 of 2007

1. R.Vellingiri
2. Mrs. Gokila .. Appellants/Ist & II Defendants

-Vs-

1. R.Kannaian
2. R.Lakshmi
3. R.Jayalakshmi
4. R.Samraj
5. C.R.Sounderrarajan
6. R.Thulasiammal
7. R.Kamatchi
8. S.P.Narasimhulu Naidu Estate Trust
having their office at
86 Mill Road, Coimbatore - 641 001 .. Respondents/1 to 5 Plaintiffs & 3 to 5 Defendants

APPEAL filed under Section 100 of the Code of Civil Procedure against the judgment and decree in A.S.No.126 of 2006 dated 21.11.2006 on the file of the First Additional Subordinate Judge, Coimbatore, affirming the judgment and decre dated 13.04.2005 made in O.S.No.1024 of 2004 on the file of the I Additional District Munsif, Coimbatore.

For appellants : Mr. R.Ramarathinam
For Respondents : Mr. P.Saravana Sowmiyan,
for R-1 to R-5 (caveator)

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J U D G M E N T

The unsuccessful defendants 1 and 2 in O.S.No.1024 of 2004 on the file of the First Additional District Munsif, Coimbatore, are the appellants in the above second appeal. For the sake of convenience, the parties are referred to as per their ranking in the suit.

2. The brief facts that are necessary for the disposal of the

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above second appeal are set-out below:-

The plaintiffs filed a suit for declaration and possession to declare that they are the absolute owners of the suit properties and for directing defendants 1 to 4 to deliver vacant possession of the suit property to the plaintiffs and for a further direction directing respondents 1 to 4 to pay future mesne profits. According to the plaintiffs, the first defendant is their brother; their father-Rangasamy Naidu took a vacant land on lease from S.P.Narasimmalu Naidu Trust, the fifth defendant, for ground rent and put up a super-structure thereon with his own funds; Rangasamy Naidu on his free will and violation, executed a Registered Will on 19.08.1988 bequeathing the suit property in favour of his wife-Ponnammal absolutely; Ponnammal is the mother of the plaintiffs and the first defendant; in 1990, Rangaswamy Naidu died and Ponnammal became the absolute owner of the suit property; in or about 1994, the first defendant became a tenant of Ponnammal in respect of a portion of the suit property; the first defendant paid rents up to January 1997 irregularly and committed default from February 1997 and he also sublet the portions to defendants 3 and 4; the second defendant claims the property by virtue of a Will said to have been executed by Ponnammal in her favour in the year 1995, but the said Will is not enforceable as the same should be treated as cancelled by the Registered Sale Deed executed by Ponnammal in favour of the plaintiffs on 30.07.1997 for a sale consideration of Rs.65,000/-; from 30.07.1997 the plaintiffs have become the absolute owners of the suit property and paying ground rent to the fifth defendant-trust; the plaintiffs filed RCOP No.6 of 1998 on the file of the District Munsif and Rent Controller, Coimbatore, for eviction against the first defendant and the sub-tenants from the property; the defendants took up a plea that by virtue of the Will executed by Ponnammal in favour of the second defendant the defendants are entitled to remain in possession and they are not tenants; by an order dated 31.01.2001 passed in RCOP No.6 of 1998 the Rent Controller held that since title is in dispute between the plaintiffs and the defendants the proper Forum to decide title is only the Civil Court and not the Rent Controller, hence the above suit.

3. Defendants 1 to 4 remained exparte and no written statement was filed; the fifth defendant alone contested the suit by filing a written statement; the fifth defendant admitted the tenancy in favour of Rangasamy Naidu and the factum of putting up the super-structure over the lease hold property by Rangasamy Naidu; the execution of the Will, dated 19.02.1988, by Rangasamy Naidu, has also been admitted by the fifth defendant; but it was contended by the fifth defendant that Rangasamy Naidu gave only life interest to Ponnammal and after her demise, the property will go to the second defendant herein.

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4. After framing appropriate issues, the suit was taken up for trial and during trial, the fifth plaintiff was examined as P.W.1 and Exs.A-1 to A-16 have been marked. On the side of the defendants neither oral nor documentary evidence were adduced. The trial court on a consideration of the oral and documentary evidence adduced in the case has pointed out that the fifth defendant had admitted the leasehold right in favour of Rangasamy Naidu and held that as per the Will-Ex.A-2 executed by Rangasamy Naidu, Ponnammal had been given absolute right over the suit property and as such Ponnammal has got a right to execute Ex.A-1-sale deed in favour of the plaintiffs in respect of the super-structure after the death of Rangasamy Naidu. The trial court has also held that in view of Ex.A-1-sale deed, dated 30.07.1997, the Will executed by Ponnammal in favour of the second defendant stood cancelled. Since defendants 1 to 4 remained exparte and no written statement was filed, the trial court decreed the suit as prayed for. Being aggrieved by that defendants 1 and 2 alone filed an appeal in A.S.No.126 of 2006 before the First Additional Sub-Court, Coimbatore. The lower appellate court on an independent consideration of the evidence on record and the reasonings of the trial court has concurred with the findings of the trial court and dismissed the appeal. Being aggrieved by that defendants 1 and 2 are before this Court in the above second appeal.

5. In the memorandum of grounds of second appeal, the following question of law has been framed as substantial question of law:

> "Whether the Ex.A-2-Will has not been proved as per law laid down in Section 68 of the Indian Evidence Act, 1972, and in view of the decision reported in A.I.R. 1976 Madras and A.I.R.1969 S.C.1147 and whether the lower appellate court is right in not considering the position of law as laid down in Section 68 of the Indian Evidence Act, 1872?"

6. Heard Mr.R.Ramarathinam, learned counsel for the appellants and Mr.P.Saravana Sowmiyan, learned counsel for caveator/respondents 1 to 5.

7. Learned counsel for the appellants submitted that Ex.A-2-Will has not been proved in accordance with the provisions of Section 68 of the Indian Evidence Act and in the absence of proper proof the Courts below have committed an error of law in holding that Ponnammal had become the absolute owner of the suit property and she had the right to execute Ex.A-1-sale deed. In support of his contentions the learned counsel for the appellants relied upon a decision in the case of Purna Bai Vs. Ranchhoddas and reported in A.I.R.1992 Andhra Pradesh 270 and in that decision in paragraph 24

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it is observed as follows:-

> "24. ..... There is absolutely no dispute with the proposition of law that no proof is required in the face of an admission. But the question is whether the admission of execution of a particular document extends to the execution of another document recited in the former document. Firstly in the case on hand there is no evidence except that of D.W.1 to show that Ex.B-1 was filed before the Income-tax Authorities in Madhya Pradesh. Even taking that it was so filed, still the admission of the signature on Ex.B-1 by P.W.2 cannot be said to be extending even to Ex.B-4, the Will referred to in Ex.B-1. As already commented supra, the attestations to the Will Ex.B-4 are not proved. In Girijadutt Vs. Gangori Dutt, AIR 1955 SC 347, it is held that in order to prove due attestation of the Will the propounder of the Will has to prove that the two witnesses saw the testator signing the Will and that they themselves signed the Will in the presence of the testator. Inasmuch as the attestation is not proved and that the admission cannot extend to the execution of the Will, the Court below has rightly exchewed the Ex.B-4 Will from consideration."

Basing reliance on the above said decision, the learned counsel for the appellants submitted that simply because the defendants have not filed a written statement that does not mean that they have admitted the due execution of Ex.A-2-Will and irrespective of the non-filing of written statement by defendants 1 and 2 the due execution of Ex.A-2-Will ought to have been proved by examining atleast one of attestors of Ex.A-2-Will. Except the above said submission, no other submission was made by the learned counsel for the appellants.

8. Learned counsel for the caveator/respondents 1 to 5 submitted that since defendants 1 to 4 remained exparte and they have not filed any written statement questioning the validity and genuineness of Ex.A-2-Will no triable issue arose in respect of the validity of Ex.A-2-Will and when the execution of Ex.A-2 is not an issue it is not necessary that Ex.A-2 should be proved as contemplated in Section 68 of the Indian Evidence Act.

9. I have carefully considered the submissions made by the learned counsel on either side, the materials available on record and the judgments of the Courts below.

10. It is pertinent to point out that defendants 1 to 4 remained exparte and no written statement has been filed and

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therefore the genuineness and validity of Ex.A-2-Will was not at all in issue. The question to be decided is even when the validity of Ex.A-2-Will had not been questioned by the defendants, yet, whether it is necessary to prove Ex.A-2 as contemplated under Section 68 of the Indian Evidence Act. In this context it will be useful to refer to a Division Bench decision of the Kerala High Court in the case of Thayyullathil Kunhikannan Vs. Thayyullathil Kalliani reported in A.I.R.1990 Kerala 226 wherein in paragraph 34 of the said decision, it is laid down as follows:-

> "34. Order 8 Rule 5 of the C.P.C. provides that unless there is a specific denial of any allegation of fact made in the plaint, it shall be taken to be admitted. Section 58 of the Evidence Act provides that no fact need be proved in any proceedings, which by any rule of pleadings in force at the time, the parties are deemed to have admitted by their pleadings. In this case, in the absence of any denial in the written statement, the genuineness and the validity of the will Ext.A1 must be deemed to have been admitted by the law of pleadings, namely Order 8 Rule 5, and therefore that fact was not required to be proved at the trial. Section 68 states that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive. The proviso to the Section which was introduced by the amending Act 31 of 1926 makes an exception in the case of any document, not being a will, which has been registered, unless its execution by the persons by whom it purports to have been executed, is specifically denied. The fact that the proviso is not applicable to wills, and that it does not make an exception in the case of registered wills, does not lead to any inference that a will cannot be acted upon or used as evidence, unless it has been proved by examining an attesting witness. The only effect of the proviso is that registration of the will by itself does not obviate the necessity of calling an attesting witness to prove it, if it is otherwise required to be proved. The proviso does not speak of a case where a will is not in dispute. Section 68 relates to those documents which require to be proved at the trial of a suit. If by any rule of law or of pleadings, such proof is not required, S.68 cannot operate to insist on formal proof by calling an attesting witness. Section 58 ha to be read as

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> overriding S.68 and as obviating the necessity for calling an attesting witness, unless the execution of the will or the attestation is in dispute. In the absence of any such plea in the written statement, it will be the height of technicality and waste of judicial time to insist on examination of an attesting witness, before a will could be used as evidence. Phipson on Evidence 12th Edition (1976) explains the rationale behind examining an attesting witness as that he is the witness appointed or agreed upon by the parties to speak to the circumstances of its execution, "an agreement which may be waived for the purposes of dispensing with proof at the trial". (paragraph 1751). In paragraph 1757, the learned author points out that proof of execution of documents required by law to be attested is dispensed with (although the attesting witness may be alive and in Court) "when the execution has been admitted for the purposes of trial". Order 8 Rule 5 C.P.C. deems the execution of the will to be admitted in the absence of any denial thereof in the written statement. Examination of an attesting witness is therefore unnecessary when the parties have not joined issue on the validity or genuineness of the will".

A reading of the above said decision clearly shows that the examination of an attesting witness to a will is unnecessary when the parties have not joined issue on the validity or genuineness of the Will. As pointed out above, the validity and genuineness of Ex.A-2-Will was not at all in issue in the above suit. Therefore, as laid down in the above said decision, the examination of one of the attesting witness to Ex.A-2-Will is not necessary.

11. In the decision reported in the case of S.Kaliyammal Vs. K.Palaniammal and reported in A.I.R.1999 Madras 40 a learned Judge of this Court in paragraph 15 of the judgment has observed as follows:-

> "I am of the opinion that, only when the execution of the Will is denied by a party, then the burden is on the party who relies upon the Will to prove the execution of the same. When the execution is not denied, it is unnecessary to compel the person who relies upon the document to let in evidence to establish the execution, since the admitted facts need not be proved"

Therefore, the substantial question of law that has been formulated in the memorandum of grounds of appeal is answered against the appellants.

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12. In the decision reported in A.I.R.1992 Andhra Pradesh 270 (referred to supra), which was relied upon the learned counsel for the appellants, the question that arose for consideration is whether the admission of execution of a particular document extends to the execution of another document recited in the former document. While considering that question, the Division Bench has held that inasmuch as the attestation is not proved, the admission cannot extend to the execution of the Will, but the facts of this case are totally different from the facts of the case cited supra and therefore the above said observation of the Division Bench is not applicable to the facts of this case.

13. For the above said reasons, the second appeal fails and the same is dismissed. However, there will be no order as to costs. Consequently the connected MP is closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. First Additional Subordinate Judge, Coimbatore
2. First Additional District Munsif, Coimbatore.

+1cc to Mr.P.Saravana Sowmiyan,Advocate Sr 55507
+1cc to Mr.T.S.Ramarathinam, Advocate Sr 55785

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